FINAL BRIEF

No. 07-2554

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BEACON ELECTRIC COMPANY

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

DAVID A. SEID
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2941

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

STATUTES **Page(s)**

Regulations

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2554

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BEACON ELECTRIC COMPANY

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Order issued against Beacon Electric Company ("Beacon") for refusing to consider for hire or to hire 49 members of the International Brotherhood of Electrical Workers, Local 212, AFL-

CIO ("the Union"). The Decision and Order of the Board issued on July 12, 2007, and is reported at 350 NLRB No. 26.[1]

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Ohio.

The Board filed its application for enforcement on December 7, 2007. The application for enforcement is timely, as the Act imposes no time limit on such filings.

[1] In this final brief, "A" references are to the joint appendix. "D&O" references are to the Board's Decision and Order. "Tr" references are to the transcript of the hearing before the administrative law judge. "GCX" and "RX" refer, respectively, to the exhibits introduced by the General Counsel and Beacon (the Respondent before the Board). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

ORAL ARGUMENT STATEMENT

Because the Board is entitled to summary enforcement of its Order, the Board does not believe that oral argument is necessary. If the Court should schedule argument, the Board suggests that 10 minutes per side would be sufficient for the parties to present their views.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board is entitled to summary enforcement of its finding that under its then-current *FES* test, which Beacon does not challenge, Beacon violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire or to hire 49 union members. A subsidiary issue is whether Beacon has waived before this Court any claim that the Board abused its discretion in declining to reconsider its decision and reopen the record to retroactively apply a later-decided case that modified the *FES* standard.

STATEMENT OF THE CASE

This case has a long procedural history, including two remands, three administrative law judge decisions, a Board decision and a motion for reconsideration. The case arose from an unfair labor practice charge filed by the Union. The Board's General Counsel issued an amended complaint alleging that Beacon violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1))

by refusing to consider for hire or to hire 49 members of the Union. (D&O 8, A 17; GCX 1(a), 1(c), (e), A 39, 44, 52.) Beacon filed an answer denying that it violated the Act. (D&O 8, A 17; GCX 1(g), A 54.)

After a hearing, Administrative Law Judge Richard Beddow issued a decision on July 14, 1998, sustaining the allegations. (D&O 1, 4, 8-15, A 10, 13, 17-24.) The General Counsel and Beacon filed exceptions to Judge Beddow's decision. (D&O 1, A 10; General Counsel and Beacon Exceptions, A 192-232.)

On June 9, 2000, the Board remanded the case to Judge Beddow for further consideration in light of its May 11, 2000 decision in *FES (A Div. of Thermo Power)*, 331 NLRB 9 (supplemented 333 NLRB 66 (2001)), *enforced* 301 F.3d 83 (3d Cir. 2002), in which the Board set forth its legal analysis for refusal-to-hire and refusal-to consider violations involving union applicants. (D&O 1, 4, 15, A 10, 13, 24; June 9, 2000 Order Remanding, A 233-34.)[2] In light of *FES*, the Board directed Judge Beddow on remand to consider "whether the General Counsel

[2] As discussed further below, *FES* established a standard for analyzing these violations where the General Counsel puts forth evidence that the employer excluded union applicants from its hiring process based on some antiunion considerations and/or the employer was hiring and did not hire the qualified union applicants based on antiunion considerations. The employer can then defend its action by showing that it would not have considered for hire or hired the applicants absent their union activity.

established that [Beacon] unlawfully refused to hire the alleged discriminatees for openings filled by other applicants." (D&O 1, 4, 16, A 10, 13, 25; June 9, 2000 Order Remanding, A 233-34.) The Board also noted that "if necessary," Judge Beddow could "reopen the record to obtain evidence required to decide the case under the *FES* framework." (June 9, 2000 Order Remanding, A 233).

On December 20, 2000, Judge Beddow issued a supplemental decision. Applying the *FES* standard he reaffirmed his earlier unfair labor practice findings and denied Beacon's request to reopen the record. (D&O 1, 4, 18-20, A 10, 13, 27-29.) Beacon filed exceptions to Judge Beddow's supplemental decision. (D&O 1, A 10; Beacon Exceptions to Supplemental ALJ Decision, A 235-279.)

On July 28, 2003, the Board remanded the case for a second time. The Board agreed with Judge Beddow that the union members were bona fide applicants, and that the General Counsel had met his initial burden under *FES* of establishing an unlawful refusal to consider and to hire the union members. The Board remanded the case to provide Beacon "an opportunity to present evidence to show that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation." (D&O 1, 4, A 10, 13; July 28, 2003 Order Remanding, A 280, 284.) The Board stated that "[t]he remand shall

include reopening the record to obtain evidence necessary to decide the case under the *FES* framework." (July 28, 2003 Order Remanding, A 284.)

On remand, Beacon waived its right to a further hearing. (D&O 21, A 30; April 2, 2004 motion, A 286.) On May 5, 2004, Judge Pargen Robertson, substituting for the retired Judge Beddow, issued a second supplemental decision. Noting that he could consider only "whether [Beacon] proved at the reopened hearing that it would not have considered or hired the alleged discriminatees in the absence of their union activity or affiliation," Judge Robertson concluded that because Beacon chose not to reopen the record, it did not meet its burden of proof. (D&O 1 and n.1, 4, 21, A 10 n.1, 13, 30.) Beacon filed exceptions to the judge's second supplemental decision. (D&O 1, A 10.)

On July 12, 2007, the Board (Chairman Batista and Members Liebman and Walsh) issued its Decision and Order adopting the judges' decisions and recommend order as modified. In agreeing that Beacon's referral policy defense was pretextual, the Board did not address the legality of Beacon's referral policy. (D&O 1 and n.6, A 10 and n.6.)

Three months later, on October 11, 2007, Beacon filed a motion for reconsideration of the Board's decision. Beacon requested that the Board reconsider its findings, reopen the record, and remand the case to the

administrative law judge for further proceedings consistent with its September 29, 2007 decision in *Toering Electric Co.*, 351 NLRB No. 18 (2007), 2007 WL 2899733, in which the Board modified the General Counsel's burden in the *FES* framework. (Motion for Reconsideration, A 304-11.) On November 30, 2007, the Board denied Beacon's motion, finding that Beacon did not raise any "extraordinary circumstances" that warranted reconsideration of the Board's decision. (Order Denying Beacon's Motion, A 312.) The Board stated that its July 2007 decision and order expressly reaffirmed its 2003 finding that the General Counsel had met his initial burden under *FES*, and this finding was the law of the case. (Order Denying Beacon's Motion, A 312-14.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Beacon's Publicly Posted Hiring Policy and Unannounced Hiring Policy

Beacon is a nonunion electrical contractor in southwestern Ohio that maintains an office in Cincinnati. (D&O 1, 8, A 10, 17; Tr 125, A 513 (Kolbinsky), Tr 522-23, A 911-12 (Mellencamp), GCX 1(c) par. 2(a), 1(g) par. 2(a), A 44 par. 2(a), 54 par. 2(a), GCX 35, A 381.) Joseph Mellencamp is Beacon's president and its part-owner. Timothy Ely serves as Beacon's

superintendent and is responsible for the hiring of individuals to fill electrician positions, including journeymen and apprentices. (D&O 8, A 17; Tr 47-48, 63-64, A 435-36, 451-52 (Ely), Tr 468-69, 528-29, 574, A 857-58, 917-18, 962 (Mellencamp), Tr 659, A 1047 (Ely), GCX 1(c) par. 4, 1(g) par. 4, A 44 par. 4, 55 par. 4, GCX 35, A 423.)

Beacon maintains a workforce of approximately 100 electricians. (Tr 478, A 867 (Mellencamp), GCX 35, A 423.) Payroll Administrator Angel LaFollette and receptionist Mona Lisa Mounce handled most hiring inquiries during the relevant time. (D&O 8, A 17; Tr 114-17, A 502-05 (LaFollette).) In approximately 1992 or 1993, Beacon posted a hiring policy in its Cincinnati office. (D&O 10, A 19; Tr 529, 536, 567, 573, A 918, 925, 955, 961 (Mellencamp), Tr 660, A 1048 (Ely), GCX 32, A 379.) The policy stated:

> BEACON ELECTRIC COMPANY APPLICATIONS FOR EMPLOYMENT POLICY
>
> Beacon makes every effort to select the most qualified employees for employment. To accomplish this, it develops a pool of applicants who are evaluated and ranked so that the most qualified are selected from the pool. Accordingly, Beacon accepts applications and resumes only at specific times of the year, whether or not it is currently hiring. The periods during which applications and resumes are accepted are determined by the President of Beacon.
>
> When applications are being accepted, they must be completed in person at the main office of the company. When the company is hiring, the applicants

> selected from the pooled applications will be interviewed and be required to pass certain skills, aptitude and substance abuse tests.

(D&O 2, A 11; GCX 32, A 379.)

In 1994, Beacon began using a referral policy that it never reduced to writing or disclosed to the public. (D&O 2, 10, 11, A 11, 19, 20; Tr 51-52, A 439-40 (Ely), Tr 573-75, 620, A 961-63 (Mellencamp), Tr 668, A 1056 (Ely).) Beacon began hiring electricians exclusively by referral through its current electricians, contacts in the industry, professional associations, vocational schools, temporary agencies, and personal contacts. (D&O 2, 10, A 11, 19; Tr 51, 53-54, 87-92, 107, A 439, 441-42, 475-80, 495 (Ely), Tr 528-30, 569-72, 575, 592, 617-19, A 917-19, 957-60, 963, 980, 1005-07 (Mellencamp), Tr 662-67, 669-70, 678-83, 739, A 1050-55, 1057-58, 1066-71, 1127 (Ely), GCX 5, 35, A 331, 381.) Beacon also had electricians loaned to it from other nonunion electrical contractors. (D&O 10, A 19; Tr 530, A 919 (Mellencamp), Tr 663, A 1051 (Ely), GCX 4, A 330.) However, Beacon did not remove its posted hiring policy. (D&O 10, A 19; Tr 55-56, A 443-44 (Ely), 573, A 961 (Mellencamp), Tr 669, A 1057 (Ely).) Mellencamp and Ely instructed Beacon's receptionists to inform any unscheduled walk-in applicants that Beacon was not accepting employment applications. (D&O 11, A 20; Tr 574-75, A 962-63 (Mellencamp), Tr 669-70, A 1057-58 (Ely).)

B. Beacon Rejects Eleanor Kumler's Application Because She is a Union Member

In the Spring of 1996, unemployed union member Eleanor Kumler called Beacon to inquire about employment. A woman stated that Beacon was hiring and that Kumler should "[c]ome in and fill out an application." (D&O 12, A 21; Tr 790, A 1178 (Kumler).) The woman said that Beacon would be interested in Kumler because she was a woman and had experience. Kumler filled out an application in Beacon's office and listed prior unionized employers. (D&O 12, A 21; Tr 790-92, A 1178-80 (Kumler).) The receptionist told Kumler to "wait a minute because [h]e's in his office." (D&O 12, A 21; Tr 792, A 1180 (Kumler).) The receptionist dropped off the application in an office and returned to the reception area. A few minutes later, a male voice called the receptionist back into the office. (D&O 12, A 21; Tr 792-93, A 1180-81 (Kumler).) Kumler heard the man state that the applicant was a "union person," and that her application should be thrown away. (D&O 12, A 21; Tr 793, A 1181.) Although the receptionist cautioned, "[S]he's still out there," the man stated, "I don't care, just get rid of it and her too." (D&O 12, A 21; Tr 793, A 1181 (Kumler).) The receptionist then came out of the office and told Kumler, "You're gonna have to leave." (D&O 12, A 21; Tr 793, A 1181 (Kumler).)

C. Beacon Hires 71 Nonunion Electricians in the First Seven Months of 1997

During 1997, Beacon was the electrical contractor on several large scale projects and a number of smaller projects. The large projects included the "Olestra job" in Cincinnati for the Proctor and Gamble Company and a project in northern Kentucky known as the City-Corp job. Beacon was chosen for the Olestra job, in part, because it could staff the project with local manpower. During the peak months of May through September, Beacon had about 60 electricians on the Olestra job, and during the peak months of January and June, it had about 45 to 50 electricians on the City-Corp job. (D&O 8, A 17; Tr 64, 72, 112-13, A 452, 460, 500-01 (Ely), Tr 469-76, 487-88, A 858-65, 876-77 (Mellencamp).) Beacon hired 71 journeymen and apprentice electricians between January 22 and August 22. (D&O 2 and n.7, 8, A 11 and n.7, 17; RX 10, A 315.) During this time period Beacon also utilized temporary electricians, hiring temporary electricians each month. (D&O 8, A 17; Tr 87, A 475 (Ely), GCX 4, 5, 37, A 330, 331, 387, RX 11, A 317.)

Beacon and other electrical contractors on the Olestra project had trouble meeting their manpower needs. (D&O 8, A 17; Tr 68-69, A 456-57 (Ely), Tr 503-04, A 892-93 (Mellencamp), GCX 24, 25, 27, 28, 30, 31, A 371, 373, 375, 376,

377, 378.) In July, additional electrical contractors were brought in to work on the Olestra job. (D&O 11; A 20; Tr 68-69, A 456-57 (Ely), Tr 490, 505, 533-34, 598-99, A 879, 894, 922-23, 986-87 (Mellencamp).)

D. In the First Seven Months of 1997 Beacon Precludes Union Members from Applying for Employment and Tells Them that It Is Not Hiring

In January of 1997, the Union learned of Beacon's contract to perform electrical work on the Olestra job. Union organizers Matt Kolbinsky and Ken Mueller coordinated efforts for union members, who were either unemployed or dissatisfied with their current employer, to apply for employment at Beacon. The Union also wanted to organize Beacon's electricians and to obtain a bargaining relationship with Beacon. (D&O 9, A 18; Tr 123, 126-29, 139-40, 166-67, 184, 201-06, A 511, 514-17, 527-28, 554-55, 572, 589-94 (Kolbinsky), Tr 228-32, A 616-20 (Mueller), Tr 307-08, A 695-96 (Fribourg), Tr 354-56, A 742-44 (Jaeger), Tr 387, 391-92, A 776, 780-81 (Zimmer), Tr 407, 409, A 796, 798 (Lana), Tr 463, A 852 (Mahoney), Tr 765-66, A 1153-54 (Elbisser), Tr 781, 787, A 1169, 1175 (Kumler), Tr 805, 807-08, A 1193, 1195-96 (Wartman).)

Members who were interested in obtaining employment at Beacon learned of application efforts through the organizers. For each attempt, interested members gathered in the Union's organizing department at the scheduled time and signed

their names or had their names affixed to a sign-in log before going to Beacon's office to apply for employment. (D&O 9, A 18; Tr 137, 142-43, A 525, 530-31 (Kolbinsky), Tr 250-51, A 638-39 (Mueller), Tr 342, A 730 (Jaeger), Tr 371-72, 377, 382, 393-94, A 760-61, 766, 771, 782-83 (Zimmer), Tr 424-25, A 813-14 (Whalen), Tr 446-50, A 1195-97 (Mahoney), Tr 807-09, A 1195-97 (Wartman), GCX 11, A 335.)

Between January 21 and May 5, union members made 16 separate attempts in person to file applications for employment with Beacon. (D&O 2 and n.8, 3, 4, 9, A 11 and n.8, 12, 13, 18; GCX 11-13, 16-17, A 335-52, 355-57.) On these occasions most of the union members wore union jackets, hats, shirts, pins, or other items identifying them as members of the Union. During each application attempt, either Kolbinsky or Mueller identified himself to the receptionist, who was sitting behind a window, as a union organizer and left his business card on the ledge or counter in the reception area. (D&O 2, 9, A 11, 18; Tr 127-33, 142, A 515-21, 530 (Kolbinsky), Tr 229-32, 239-42, A 617-20, 627-30 (Mueller), Tr 279-81, 291, A 667-69, 679 (Fribourg), Tr 345-46, A 733-34 (Jaeger), Tr 374-75, A 736-64 (Zimmer), Tr 427-28, A 816-17 (Whalen), Tr 446-47, A 835-36 (Mahoney), GCX 9, A 332.) As highlighted below, Beacon never allowed the union members to apply for employment or informed them of its referral policy.

Instead, Beacon informed the union members that they could not apply because Beacon was not hiring and/or accepting applications. During the same time period, union members received the same response when they tried to obtain employment by telephone. (D&O 9, A 18; Tr 182-84, A 570-72 (Kolbinsky), Tr 294, A 682 (Fribourg), Tr 386-87, A 775-76 (Zimmer), Tr 431-32, A 820-21 (Whalen), Tr 788, A 1176 (Kumler), GCX 22, A 363.)

1. January 21

On January 21, 10 union members went to Beacon's facility to apply. Several of them crowded in the small reception area while the others waited just outside the door. (D&O 2 and n. 8, 9, 12, A 11 and n.8, 18, 21; Tr 137-140, A 525-28 (Kolbinsky), Tr 229-32, A 617-20 (Mueller), Tr 780-84, A 1168-72 (Kumler), GCX 11, A 335.) Kolbinsky asked the receptionist if Beacon was hiring. She replied that Beacon was not hiring or accepting applications. (D&O 9, A 18; Tr 129-31, A 517-19 (Kolbinsky), Tr 233-35, A 621-23 (Mueller).)

Beacon hired 6 electricians between January 22 and 27. (D&O 2-3, A 11-12; RX 10, A 315.)

2. January 29

On January 29, former Beacon electricians, Charles Fribourg and Wayne Whalen, accompanied by organizers Kolbinsky and Mueller, went to Beacon's

office. (D&O 3, 9, A 12, 18; Tr 142, 147-48, A 530, 535-36 (Kolbinsky), Tr 236-37, A 624-25 (Mueller), Tr 277-78, A 665-66 (Fribourg), Tr 410-11, 420, A 799-800, 809 (Whalen), GCX 11, 17, A 335, 357.) Fribourg and Whalen each had approximately 30 years experience as electricians. (D&O 3, A 12; Tr 277, 297, A 665, 685 (Fribourg), Tr 410, A 799 (Whalen).) Fribourg asked to speak to President Mellencamp, but the receptionist stated that he was out of town. Fribourg identified himself as an ex-employee and asked to talk to Beacon's "hiring agent" because he had heard that Beacon has a sizable job and was calling back some of its former electricians. (D&O 3, 9, A 12, 18; Tr 236-38, A 624-26 (Mueller), Tr 420-21, A 809-10 (Whalen), GCX 17, A 357.) The receptionist summoned Superintendent Ely. (D&O 3, 9, A 12, 18; GCX 17, A 357.)

Ely recognized Fribourg and told him that Beacon "can't take applications." (D&O 3, 9, 12, A 12, 18, 21; Tr 58, A 446 (Ely), Tr 281-82, A 669-70 (Fribourg), GCX 17, A 357.) Ely referred the group to the posted "Applications for Employment Policy." (D&O 3, 9, A 12, 18; Tr 58, A 446 (Ely), Tr 239, A 627 (Mueller), Tr 281, A 669 (Fribourg), Tr 422, A 811 (Whalen), GCX 17 p. 1, A 357.) Whalen told Ely, "I just wanted to make sure my application was still in there. They said they had kept my name on a [recall] list when I got laid off." (D&O 3, 9, A 12, 18; GCX 17 p. 1, A 357.) Ely replied, "Nah," and said Beacon

was "not taking applications." (D&O 3, 9, A 12, 18; GCX 17, A 357.) Ely shut the sliding window through which he was speaking to the group as Whalen attempted to ask whether he was on the rehire list. (D&O 3, 9, A 12, 18; GCX 17 p. 2, A 358.)

Fribourg wrote to President Mellencamp to express his interest in joining Beacon's applicant pool. (D&O 3, 9, A 12, 18; Tr 291-93, A 679-81 (Fribourg), GCX 19, A 361.) Fribourg's letter, dated February 1, referenced the posted "Applications for Employment Policy," and asked Mellencamp to notify him when he planned to accept applications or resumes. (D&O 3, 9, A 12, 18; GCX 19, A 361.) Fribourg's letter stated that he knew other electricians who were interested in applying. (D&O 3, 9, A 12, 18; GCX 19, A 361.) Fribourg concluded, "[i]f you do not plan to open your pool then please inform me which [h]iring service Beacon is using. . . ." (D&O 3, 9, A 12, 18; GCX 19, A 361.)

President Mellencamp's response, dated February 5, did not disavow the "Applications for Employment Policy," and did not disclose the unwritten referral policy. (D&O 3, 9, A 12, 18; Tr 292-93, A 680-81 (Fribourg), GCX 20, A 362.) The letter stated that Beacon was "not advertising for applications or resumes for electricians at this time." (D&O 3, 9, A 12, 18; GCX 20, A 362.) Mellencamp stated,

"At this time we cannot predict when such need may arise." (D&O 3, 9, A 12, 18; GCX 20, A 362.)

Beacon hired 3 electricians on January 29 and 1 on February 3. (D&O 2, 3, A 11, 12; RX 10, A 315.)

3. February

On February 21, nineteen union members, including former employee Fribourg, went to Beacon's office to apply for employment. (D&O 3, 9, A 12, 18; Tr 278-79, 287, A 666-67 (Fribourg), Tr 342-44, A 730-32 (Jaeger), Tr 370-72, A 759-61 (Zimmer), Tr 763-65, A 1151-53 (Elbisser), GCX 11, 22, A 335, 363.) Kolbinsky asked, "[W]e hear . . . [that Beacon is] hiring, can we fill out applications?" (D&O 3, 9, A 12, 18; GCX 12 p. 2, A 352.) The receptionist replied, "[Beacon is] not accepting applications right now." (D&O 3, 9, A 12, 18; GCX 12 p.2, A 352.) Kolbinsky twice asked whether Beacon was "hiring through any temporary employment agencies." (D&O 3, 9, A 12, 18; GCX 12 p. 2, A 352.) Both times the receptionist answered, "Nope." (D&O 3, 9, A 12, 18; GCX 12 p. 2, A 352.)

Beacon hired an electrician on February 24. (D&O 3, A 12; RX 10, A 315.)

On February 27, nineteen union members tried to apply. The receptionist stated that Beacon was not hiring and not taking any applications. (D&O 3, 9-10,

A 12, 18-19; Tr 146, A 534 (Kolbinsky), Tr 346-48, A 734-36 (Jaeger), Tr 375-76, 381-82, A 764-65, 770-71 (Zimmer), Tr 763-65, A 1151-53 (Elbisser), GCX 11, 22, 33, A 335, 363, 380.)

4. March

Fribourg again attempted to apply on March 3. (D&O 3, 10, A 12, 19; Tr 289-90, A 677-78 (Fribourg).) He spoke with receptionist LaFollette. Fribourg said he had heard Beacon was hiring a number of people and asked if Beacon was taking applications. (D&O 10, A 19; Tr 290, A 678 (Fribourg).) LaFollette told him, "No." (D&O 10, A 19; Tr 290, A 678 (Fribourg).)

Twenty three union members tried to apply on March 6, six on March 11, five on March 19, and five on March 27. All were told that Beacon was not hiring or accepting applications. (D&O 3, 10, A 12, 19; Tr 146, A 534 (Kolbinsky), Tr 348, 352, A 736-40 (Jaeger), Tr 376-80, 382, A 765-69 (Zimmer), Tr 403-05, A 792-94 (Lana), GCX 3, 10, 11, 13, 22, 33, A 318, 333, 335, 353, 363, 380.)

Beacon hired 5 electricians on March 17. (D&O 3, A 12; RX 10, A 315.)

5. April

Seven union members tried to apply on April 3, five on April 10, ten on April 17, and nine on April 25. None had success. (D&O 3, A 12; Tr 379, A 768 (Zimmer), GCX 11, 22, A 335, 363.) On April 17 union organizer Mueller asked

if Beacon was hiring. (D&O 10, A 19; GCX 16, A 355.) The receptionist replied, "[Beacon was] not accepting applications." (D&O 10, A 19; GCX 16, A 355.) Mueller then noted "there's a difference between hiring and accepting applications. . . . We've already . . . applied . . . at all the temporary services in town and just wondering . . . if your hiring." (D&O 10, A 19; GCX 16, A 355.) The receptionist shut the window and did not respond. (D&O 10, A 19; Tr 243-44, A 631-32 (Mueller), GCX 16, A 355.)

Beacon hired twelve electricians between April 1 and April 21. (RX 10, A 315.)

6. May

Nine union members tried to apply on May 1 and four on May 5. None had success. On May 1, the receptionist stated that Beacon was not hiring and that they could not fill out applications. (D&O 4, A 13; GCX 22, A 363.)

Beacon hired 6 electricians in May, 21 in June, and 15 in July. (RX 10; A 315.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 12, 2007, the Board (Chairman Battista and Members Liebman and Walsh) issued its Decision and Order, finding, in agreement with the administrative law judges that Beacon had violated Section 8(a)(3) and (1) of the

Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to consider for hire and to hire the 49 union members. (D&O 6, A 15.)

The Board's Order requires Beacon to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 6, A 15.) Affirmatively, the Board's Order requires Beacon to offer employment to the 49 union members and to make them whole for any loss of earnings and benefits suffered as a result of the discrimination against them. (D&O 6, A 15.) The Board, relying on *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, slip op. at 7 (2007), 2007 WL 1610437 *7 (petition for review pending Case No. 07-1479, D.C. Circuit), noted, however, that "the instatement award is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that the discriminatees would still be employed by [Beacon] if they had not been the victims of discrimination." (D&O 6 n. 13, A 15 n.13.) The Order also requires Beacon to post copies of a remedial notice. (D&O 6, A 15.)

On November 30, 2007, the Board denied Beacon's motion for reconsideration of the Board's decision. The Board found that Beacon's reliance on the Board's decision in *Toering Electric Co.*, 351 NLRB No. 18 (2007), 2007

WL 2899733, which issued 2 months after the Board's decision here, did not raise any "extraordinary circumstances" that warranted reconsideration of the Board's decision. (Order Denying Beacon's Motion, A 312.)

SUMMARY OF ARGUMENT

Before this Court, Beacon does not dispute that the Board, applying its, then-existing *FES* standard, properly found that Beacon unlawfully refused to consider or hire 49 union members who sought employment with Beacon. Accordingly, the Board is entitled to summary enforcement of its unfair labor practice finding.

Instead, Beacon argues that the litigation should start anew to apply modifications the Board made to the *FES* standard in its *Toering* decision, which issued several months after its decision issued in this case. Beacon has waived any argument that *Toering* should retroactively apply, however, because Beacon does not assert in its brief to this Court that the Board abused its discretion in denying Beacon's motion for reconsideration to retroactively apply *Toering*. Moreover, the Board's determination not to permit this case to start anew under revised burdens of proof is particularly appropriate given that Beacon waived the opportunity provided 5 years ago by a Board remand to reopen the record to establish an affirmative defense. It is time for this litigation to come to an end without giving Beacon another bite at the apple.

ARGUMENT

THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT UNDER ITS THEN-CURRENT *FES* TEST, WHICH BEACON DOES NOT CHALLENGE, BEACON VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO CONSIDER FOR HIRE OR TO HIRE 49 UNION MEMBERS

A. Introduction

In this case, the Board, applying established law—the standard it developed in *FES (A Div. of Thermo Power)*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002), for analyzing discriminatory refusal-to-hire and/or refusal-to-consider cases[3] —found that Beacon violated the

[3] Under *FES*, the Board's General Counsel must make an initial showing that the employer excluded applicants from its hiring process and that antiunion animus contributed to the employer's decision not to consider the applicants. *FES*, 331 NLRB at 15. In the refusal-to-hire context, the General Counsel must demonstrate that the employer was hiring, or had concrete plans to hire; the applicants had experience or training relevant to the announced or generally known requirements of the open job positions; and antiunion animus contributed to the employer's decision not to hire the applicants. *FES*, 331 NLRB at 12. *Accord Casino Ready Mix Inc. v. NLRB*, 321 F.3d 1190, 1194 (D.C. Cir. 2003); *Cheney Constr., Inc.*, 344 NLRB 238, 240-41 (2005). Once the General Counsel has met his initial burden, the employer may defend its actions by showing by a preponderance of the evidence that it would not have either considered or hired the applicants, even in the absence of their union affiliation. *FES*, 331 NLRB at 12, 15. *Accord Casino Ready Mix v. NLRB*, 321 F.3d at 1194 (refusal to hire); *Int'l Union of Operating Eng'rs v. NLRB*, 294 F.3d 187, 189 (D.C. Cir. 2002) (refusal to consider). If the employer's proffered business justification is shown to be pretextual—that is, if the reason either did not exist or was not in fact relied upon—the defense fails and the inquiry is logically at an end. *Wright Line*, 251 NLRB 1083, 1083 (1980),

Act in 1998 when it refused to consider for hire or to hire 49 union members.[4] The Board found that during the period when the 49 qualified union members applied for electrician positions, Beacon deceived the applicants by denying that it was hiring and deliberately sought to divert them from discovering its referral policy, even as it hired 71 electricians. (D&O 5, A 14.)

As fully set out in the Statement of the Case, this case has a long procedural history during which Beacon was given every opportunity to develop a record that would demonstrate that it did not refuse to consider or hire the union members because of their union affiliation, but for other neutral reasons, including, for example, disruptive behavior. The Board found a statutory violation only after twice remanding the case over a 13-year period. Five years ago, the Board remanded the case to provide Beacon the opportunity to establish a defense that it

---

enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), *and approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)); *accord W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871-74 (6th Cir. 1995).

[4] *FES* was a response to the urging of this and other courts, and refined the *Wright Line* test 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *and approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)), typically applied in a discharge context. This Court subsequently approved the Board's *FES* refusal-to-hire standard in *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 968 (6th Cir. 2003). The Court held, however, that before it would find a refusal-to-consider for hire violation, the Board must show that the employer had jobs available for the applicants. *Id*. at 975-976.

would not have considered for hire, or hired, the union members absent their union affiliation. Beacon waived its right to a hearing to establish a defense, resting instead on the then-existing record.

However, 3 months after the Board issued its Decision, Beacon sought reconsideration from the Board, asking the Board to reopen the record and hold a new hearing to apply its newly-issued decision in *Toering Electric Co.*, 351 NLRB No. 18 (2007), 2007 WL 2899733, in which the Board modified the *FES* analytical framework and required the General Counsel to provide proof of an applicant's genuine job interest as an element of the General Counsel's initial burden. The Board declined to reconsider the case or to reopen the record.

As shown below, Beacon is precluded from challenging either the Board's determination that it violated the Act or the Board's refusal to reconsider the case under *Toering*. In its brief, Beacon does not dispute that *FES* was the relevant analytical legal standard when the Board issued its decision. In addition, Beacon's brief fails to challenge the Board's factual findings, legal conclusions, and remedial relief under the *FES* standard, or even to allege that the Board's finding a violation under *FES* is not supported by substantial evidence. Accordingly, Beacon has waived its right to challenge the Board's Order and the Board is

entitled to summary enforcement of its finding that under the *FES* standard Beacon unlawfully refused to consider or hire 49 union members.

Beacon's sole challenge is to the Board's failure to retroactively apply the modification the Board made to its established *FES* standard in *Toering*. Beacon does not, however, assert in its brief to this Court that the Board abused its discretion in denying its motion for reconsideration to retroactively apply *Toering*. Accordingly, Beacon has waived any argument that *Toering* should retroactively apply. Moreover, the Board's determination not to permit this case to start anew under revised burdens of proof is particularly appropriate given that *Toering* issued 5 years after Beacon waived an opportunity to establish an affirmative defense under the *FES* standard. Aside from asserting a variety of policy arguments that it believes the Board should have considered in reevaluating its finding of a violation, Beacon has failed to articulate any legal basis for not enforcing the Board's Order.

B. The Board Is Entitled To Summary Enforcement Of Its Finding That Under Its *FES* Test Beacon Unlawfully Refused To Consider Or Hire 49 Union Members

Beacon's brief does not challenge the Board's finding that under the Board's *FES* test it violated Section 8(a)(3) and (1) of the Act when it unlawfully refused to consider or hire 49 union members. Thus, Beacon's brief does not dispute that the

General Counsel met his burden under the *FES* test, or that Beacon failed to establish an affirmative defense that it would not have considered or hired the union members absent their union activity.

Because Beacon did not argue in its opening brief that the Board's finding of a violation under the *FES* test was unsupported by substantial evidence, that issue is waived before this Court. *See Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (Where employer "does not argue in its appellate brief against the validity of the Board's rulings . . . [a]ny challenges to those rulings have thus been waived."). *See generally Wu v. Tyson Foods Inc.*, 189 Fed. Appx. 375, 381 (6th Cir. 2006) ("This court has consistently held that arguments not raised in a party's opening brief, as well as arguments adverted to in only a perfunctory manner, are waived."); *McCalvin v. Yukins*, 444 F.3d 713, 723 (6th Cir. 2006) ("It is well established that issues not raised by an appellant in its opening brief . . . are deemed waived.") It follows that the Board is entitled to summary enforcement of its uncontested finding that Beacon violated the Act, as well as its remedial Order. *See NLRB v. General Fabrications Corp.*, 222 F.3d 218, 231-32 (6th Cir. 2000); *NLRB v. Autodie Int'l*, 169 F.3d 378, 381 (6th Cir. 1999).

Nevertheless, there is ample record evidence to support the Board's findings.[5] Beacon does not dispute that jobs were available for the 49 union members, having hired 71 other electricians around the same time that the union members attempted to apply. Nor does Beacon dispute the Board's finding (D&O 18, A 27) that the union members were experienced electricians who met the generally known requirements for electrician positions with Beacon, an electrical contractor. Beacon's posted application policy (GCX 32, A 379) did not, as the Board explained (D&O 16, A 25), set forth any "specific or unique qualifications." In addition, there is ample undisputed record evidence that Beacon's failure to hire the union applicants was motivated by union animus. Beacon was hiring through its unwritten and undisclosed referral policy, yet its managers at the same time continued to deliberately and falsely suggest to the union applicants that Beacon either was not hiring at the time, or that its posted hiring policy, that implicitly permitted walk-in applicants, was still in effect. As the D.C. Circuit has recognized, such deliberate misrepresentations to union applicants permits a finding that an employer's actions were motivated by antiunion animus.

---

[5] When challenged, the Board's factual findings and inferences must be upheld so long as they are supported by substantial evidence, no matter that the reviewing court could justifiably make different findings were it to consider the matter *de novo*. *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006).

Progressive Electric Inc. v. NLRB, 453 F.3d 538, 550 (D.C. Cir. 2006) (employer "lied" to union applicants, "assuring them" it would call when openings existed, "when in fact [it] had no such intention"). *See also Commercial Erectors, Inc.*, 342 NLRB 940, 943 (2004) (evidence of union animus when employer made "misleading or even false statements" to union members that it would call them when it had openings, but contemporaneously hired employees and never communicated its purported hiring policy to the union members).

Beacon waived its right to a hearing to demonstrate that it would not have considered or hired the applicants even in the absence of their union activity. And before this Court, Beacon does not dispute that the Board reasonably rejected as pretextual Beacon's claim that it would not have hired the union applicants because they did not comply with Beacon's legitimate referral policy. Indeed, there is ample evidence that Beacon never revealed the referral policy to the union applicants, and did not rely on the policy when it rejected these applicants. Instead, the Board found (D&O 5, A 14), Beacon "deceived the union applicants by denying that it was hiring (either directly or through temporary employment agencies) and deliberately sought to divert them from discovering its referral policy by suggesting that, once the company started hiring, they would be considered for employment" pursuant to its posted hiring policy.

Accordingly, the Board reasonably found (D&O 5, A 14) that Beacon's "deliberate misrepresentations" failed to "rebut[] the General Counsel's initial showing that [Beacon] had an overall scheme of refusing to hire or consider union applications." *See Fluor Daniel Inc v. NLRB*, 332 F.3d 961, 971 (6th Cir. 2003) (employer's reliance on a 30-day valid application rule was pretextual because the employer never notified the applicants of the rule); *Progressive Electric Inc. v. NLRB*, 453 F.3d 538, 548 (D.C. Cir. 2006) (employer's reliance on a policy that only considered applications valid for 45 days was pretextual because the employer never informed the applicants of the rule); *Commercial Erectors, Inc*., 342 NLRB 940, 943 (2004) (rejecting employer's affirmative defense—a hiring policy that gave preference to those who applied early in the morning—because the employer "did not reveal this purported hiring policy").

C. Beacon Has Waived Before This Court Any Claim That The Board Abused Its Discretion By Declining To Reconsider Its Decision And Retroactively Apply A Later-Decided Modification To Its *FES* Standard

Beacon's sole argument that the Board should have remanded this case for a third time to reopen the record and to retroactively apply its decision in *Toering Electric Co.*, 351 NLRB No. 18 (2007), 2007 WL 2899733 ("*Toering*"). The Board expressly rejected Beacon's motion for reconsideration, finding its

modification of the *FES* analytical framework in *Toering* did not constitute "extraordinary circumstances" under its rules.[6] The Board explained that in 2003 it found that the General Counsel had carried his initial burden under *FES* to prove that Beacon unlawfully refused to consider or hire the union applicants, and that its July 2007 order expressly reaffirmed this 2003 finding. (Board Order Denying Reconsideration). Since that finding under the then-extant *FES* framework was the law of the case, the Board did not abuse its discretion in denying Beacon's motion, and, as shown below, Beacon does not argue to the contrary.

In *Toering*, which issued 2 ½ months after the Board's Decision here, the Board held that it "will no longer conclusively presume that an applicant is entitled to protection as a statutory employee." 351 NLRB No. 18 slip op. at 9, 2007 WL 2899733 *12. While the Board would not assume the contrary, that an applicant was anything other than legitimate, the Board established that "proof of an applicant's genuine job interest is an element of the General Counsel's *prima facie* case under *FES.*" 351 NLRB No. 18 slip op. at 10, 2007 WL 2899733 *12. "Thus, if at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment, the General

[6] 29 CFR Section 102.48(d).

Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to prove that the applicant is an employee within the meaning of [the Act]." 351 NLRB No. 18 slip op. at 10, 2007 WL 2899733 *12.[7]

Beacon's opening brief ignores the Board's denial of its motion for reconsideration to retroactively apply *Toering*. To the extent Beacon is implicitly arguing that the Board improperly denied its motion for reconsideration, Beacon's brief fails even to address the legal standard for evaluating such Board action. It is settled that in reviewing a Board decision to grant or deny a motion for reconsideration, the Court examines whether the Board abused its discretion. *See Dayton Hudson Dept. Store Co. v. NLRB*, 987 F.2d 359, 366 (6th Cir. 1993). Yet, Beacon's brief fails even to assert that the Board abused its discretion. Instead, Beacon argues throughout its brief that because the Board refused to apply *Toering*, the Board's decision is unsupported by substantial evidence. Unless Beacon can establish that the Board abused its discretion by refusing to reconsider

[7] The Board explained that the employer may contest the genuineness of the application through, among other things, evidence "that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment." 351 NLRB No. 18 slip op. at 9, 2007 WL 2899733 *12.

the case in light of *Toering*, an argument Beacon's opening brief never raises, the Court cannot reach Beacon's claim that it would have prevailed had the Board applied *Toering*. *See above* p. 26, *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008); *Wu v. Tyson Foods Inc.*, 189 Fed. Appx. 375, 381 (6th Cir. 2006); *McCalvin v. Yukins*, 444 F.3d 713, 723 (6th Cir. 2006).

Moreover, the Board properly refused to reopen the record. After two remands, and an opportunity to supplement the record with evidence of a defense, the Board properly refused Beacon's request to begin litigation of this case anew. The issue concerning the status of the applicants was resolved by the Board in 2003 under the then-current *FES* standard. Despite being given an opportunity to present a defense, Beacon subsequently waived its right to a hearing and rested on the existing record. (D&O 21, A 30.) Under the then-current *FES* standard, had Beacon demonstrated that it had a neutral reason for failing to hire the applicants, such as its claim to this Court that the union applicants engaged in conduct that was abusive and egregious, the complaint may have been dismissed. *See, for example, Exterior Systems, Inc.*, 338 NLRB 677 (2002) (complaint dismissed where employer demonstrated that applicant's disrespectful and disruptive conduct

was the basis for the refusal to hire, not his union affiliation).[8] In these circumstances, the Board was fully justified in denying reconsideration.

Moreover, Beacon's assertion—that *Toering* should apply retroactively because the union applicants engaged in coercive conduct as well as "abusive tactics" that were the subject of the Board's concern in *Toering*—is factually inaccurate. The judge found that the union applicants did not engage in any such conduct. Beacon's characterization of the application process (Br 13-15, 22) as an "aggressive" salting campaign because the union applicants wore union emblems, used a video recorder and crowded into a small reception area is unsupported by the record. The judge found (D&O 13, A 22) "the Union's obvious use of audio and video recording devices may be a wise or unwise strategy but as long as it is

[8] Indeed, even under the precursor to *FES*, employers could successfully defend against charges that they violated Section 8(a)(3) if they could demonstrate that, notwithstanding proof that their actions were motivated by union animus, they would not have hired the applicant. *See Heiliger Electric Co*., 325 NLRB 966, 966 n.3 (1998) (complaint dismissed where applicants videotaped and did not cease taping when employer's representatives requested, "the overall environment created by the applicants was, at the very least, sufficiently intimidating and disrespectful to privilege a decision by [the employer] to not hire the five applicants"); *American Steel Erectors, Inc.*, 339 NLRB 1315, 1315-17 (2003) (complaint dismissed where applicant's prior public statements filled with deliberate and outrageous exaggerations about the employer justified employer's refusal to hire him).

not so intrusive as to unlawfully intimidate an employer, the law otherwise permits a union to make nonmalicious and noncoercive efforts to put pressure on a company to accede to a union's bargaining demands or organizational efforts or to protest unfair labor practices." *See Progressive Electric Inc. v. NLRB*, 453 F.3d 538, 552 (D.C. Cir. 2006). The judge found (D&O 13, A 22) that there was "no showing that [Beacon's] supervisors or receptionists were threatened or intimidated and there was no request made for the Union to stop." Instead, after being rebuffed by Beacon, the union applicants peacefully left the premises. In the absence of any legal challenge to the Board's refusal to apply *Toering*, or any proof for its unfounded accusations, this Court cannot allow Beacon yet another bite at the apple.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

s/JILL A. GRIFFIN
JILL A. GRIFFIN
Supervisory Attorney

s/DAVID A. SEID
DAVID A. SEID
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2941

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

August 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 07-2554
	*	
v.	*	
	*	Board Case No.
BEACON ELECTRIC COMPANY	*	09-CA-35127
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,857 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of August, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 07-2554
	*	
v.	*	
	*	Board Case No.
BEACON ELECTRIC COMPANY	*	09-CA-35127
	*	
Respondent	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by overnight mail upon the following counsel at the address listed below:

Jeffrey Mullins, Esq.
TAFT, STETTINIUS & HOLLISTER
110 N. Main Street
Suite 900
Dayton, OH 45402

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of August, 2008